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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**SILCOR (USA), INC.,**

**Plaintiff and Appellant,**

**v.**

**LAND USE DEVELOPMENT  
CORPORATION et al.,**

**Defendants and Respondents.**

**A122506**

**(Contra Costa County  
Super. Ct. No. C0501622)**

Silcor (USA), Inc., (Silcor) appeals from an adverse judgment in a civil action. It contends (1) the trial court erred when it granted summary adjudication on one of the causes of action alleged, and (2) the court erred when it granted two in limine motions prior to trial. We conclude the court did not commit any prejudicial errors and will affirm.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

In the early 1990's Silcor got into a legal dispute with Land Use Development Corporation (Ludco) and Ronald L. Sette. Respondent in this appeal, Steven L. Pollak, is an attorney. He represented Ludco and Sette in that legal dispute. Silcor was represented by a different attorney, Raul S. Picardo. The dispute was settled when Ludco and Sette agreed to assign Silcor up to \$90,000 from any recovery that they might obtain in separate litigation against people named the Carters.

Many years later, and after a dizzyingly complex series of legal transactions that are not directly relevant to this appeal, Ludco, Sette and Pollak, became the owners of certain real property that formerly had been owned by the Carters. Silcor believed that when the property was sold, Ludco and Sette were obligated to pay their \$90,000 debt. Picardo contends that Pollak told him repeatedly that he would let him know when the property was being sold so Silcor could be paid.

According to Picardo, Pollak did not tell him when the property was sold. As a result, Silcor was never paid the amount it was owed.

Based on these facts, Silcor filed a complaint against Ludco, Sette, and Pollak. Only the causes of action against Pollak are relevant here. The eighth cause of action sought to set aside the instrument by which Ludco and Sette conveyed an interest in the real property to Pollak. The ninth cause of action alleged a conspiracy to defraud. The tenth cause of action alleged fraudulent misrepresentation. The eleventh cause of action sought to impose a constructive trust.

Pollak filed a motion for summary judgment or in the alternative summary adjudication on each of the causes of action that had been alleged against him. The trial court conducted a hearing on the motion and denied Pollak's request for summary judgment. However, the court did grant summary adjudication on the eighth, ninth, and eleventh causes of action.

The sole remaining tenth cause of action against Pollak was set for trial. Prior to trial, Pollak filed several motions in limine. Two of them are relevant here. The first sought to exclude all communications between Pollak and Picardo under the theory that both were attorneys who were representing clients and therefore all communications between them were privileged. (Civ. Code, § 47, subd. (b).) The second sought to prevent Silcor or its witnesses from using the word "conspiracy" at trial.

The trial court conducted a hearing on Pollak's motions. The court took the litigation privilege motion under submission and set the conspiracy motion for an

Evidence Code section 402 hearing to determine whether Silcor could present sufficient evidence of a conspiracy.

Subsequently, the court granted the litigation privilege motion ruling that “[Pollak’s] Motion in Limine . . . to exclude discussions between Steven Pollak and Raul Picardo is granted pursuant to Civil Code section 47, except for impeachment or if Defendant Pollak ‘opens the door.’”

The court then conducted a two-day Evidence Code section 402 hearing. At the conclusion of the hearing, the court ruled that Silcor could not use the word “conspiracy” at trial because it had “failed to present sufficient evidence of a prima facie case of conspiracy against Defendant Pollak.”

Silcor conceded it could not establish a prima facie case against Pollak in light of the court’s in limine rulings. It stipulated that judgment be entered against it.

## II. DISCUSSION

### A. Summary Adjudication

Silcor contends the trial court erred when it granted Pollak summary adjudication on its ninth cause of action alleging conspiracy to defraud.

Summary adjudication must be granted when there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (f)(1).) On appeal we decide de novo whether the moving party was entitled to summary adjudication under the facts presented. (*California Highway Patrol v. Superior Court* (2006) 135 Cal.App.4th 488, 496.)

Here, the trial court granted Pollak summary adjudication on the ninth cause of action because conspiracy is not an independent cause of action. The trial court was correct in its statement of this rule of law. Conspiracy is *not* an independent cause of action. (See 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 921, p. 335.) Rather a conspiracy allegation is simply a way of holding several persons responsible for the wrongful act committed by one or more of them. (*Mox Incorporated v. Woods* (1927)

202 Cal. 675, 677.) But the court was incorrect in its reasoning and application of this rule to adjudicate the ninth cause of action. The ninth cause of action did not simply allege a conspiracy. It alleged a conspiracy *to defraud*. A civil cause of action based on a conspiracy is sufficient if it alleges, (1) the formation and operation of the conspiracy, (2) the wrongful act or acts committed by one or more of the conspirators, and (3) resulting damage. (*Ibid.*; see also *Younan v. Equifax Inc.* (1980) 111 Cal.App.3d 498, 511, fn. 9.) Silcor's ninth cause of action contains all of these elements. The trial court erred when it granted summary adjudication on the ninth cause of action based on the allegations in the complaint.

Nevertheless, our conclusion on this point does not necessarily mean the judgment in favor of Pollak must be reversed. After the trial court granted Pollak summary adjudication on three of the causes of action alleged, the court set the case for a trial on the remaining tenth cause of action alleging fraudulent misrepresentation. Prior to that trial, Pollak filed and the trial court ruled on two motions in limine. As we will explain, the court's ruling on one of those motions demonstrates Silcor cannot establish a cause of action based on a conspiracy to defraud.

## B. In Limine Rulings

### 1. Ruling Concerning a Conspiracy

Prior to trial, Pollak filed an in limine motion to prevent Silcor from offering "evidence related to any fraudulent transfer" or using the word "conspiracy" at trial. The trial court set an Evidence Code section 402 hearing to determine whether Silcor could present sufficient evidence of a conspiracy. After a two-day hearing, the court ruled Silcor could not use that word because it had failed to present *prima facie* evidence of a conspiracy.

Silcor now challenges the court's ruling, arguing it did present sufficient evidence. We reject this argument on procedural grounds. While Silcor has provided us with a transcript of the Evidence Code section 402 hearing, it has not cited that transcript.

Indeed, Silcor's briefs on this point contains no citations to the record at all. Thus, we are left to guess where in the over 800 pages of clerk's and reporter's transcripts that evidence sufficient to support a conspiracy might exist. An appellant must provide citations to the record to support the points it advances on appeal. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.) If an appellant fails to do so, its argument may be deemed forfeited. (*Ibid.*; see also *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115.)

Here, Silcor has failed to cite the record to show where evidence sufficient to support a conspiracy might exist. Because it has failed to do so, we conclude Silcor has forfeited the right to raise the issue on appeal.

This conclusion has important consequences for Silcor's ninth cause of action alleging a conspiracy to defraud. As we have stated, an essential element of that cause of action is the formation and operation of a conspiracy, (*Mox Incorporated v. Woods*, *supra*, 202 Cal. at p. 677) and Silcor failed to demonstrate that it has sufficient evidence to support a conspiracy. Since Silcor cannot establish one of the elements of the cause of action it alleged, Pollak was entitled to summary adjudication on that cause of action. (Code Civ. Proc., § 437c, subd. (f)(1).)<sup>1</sup> Any error the court may have committed was harmless.

## 2. Litigation Privilege

As we have stated, Pollak also filed a motion in limine that sought to exclude all communications between himself and Picardo under the theory that both of them were attorneys who were representing clients and therefore, all communications between them were privileged. (Civ. Code, § 47, subd. (b).) The trial court conducted a hearing on

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<sup>1</sup> Silcor *does not* argue that it should be permitted to pursue a simple cause of action alleging fraud.

Pollak's motion and granted it. Silcor now contends the trial court abused its discretion when it ruled the communications between Pollak and Picardo were privileged.

Again, we reject this argument on procedural grounds. While the trial court conducted a hearing on Pollak's in limine motion concerning the litigation privilege, Silcor has not provided us with a reporter's transcript of that hearing. Thus, we have no way to evaluate what the trial court did. Silcor, as the party challenging the trial court's discretionary ruling had the obligation to provide this court with a record that is adequate to permit review. (*Wagner v. Wagner* (2008) 162 Cal.App.4th 249, 259.) Having failed to provide the transcript that is necessary to evaluate the trial court's discretionary ruling, we conclude Silcor has forfeited the right to raise this issue on appeal. (*Ibid.*)

### III. DISPOSITION

The judgment is affirmed.

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Jones, P.J.

We concur:

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Simons, J.

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Bruiniers, J.\*

\*Judge of the Superior Court of Contra Costa County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.